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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

J. W. SPENCE, doing business as GEFF SEED AND GRAIN COMPANY, *Petitioner*,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1966

No.....

J. W. SPENCE, doing business as GEFF SEED AND GRAIN COMPANY, *Petitioner*,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, *Respondent*.

To the United States Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI

Petitioner, J. W. SPENCE, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on May 18, 1966, reversing a District Court judgment which held that Respondent had violated its duty to furnish reasonable transportation to petitioner and ordering it to furnish adequate facilities to discharge such obligation.

OPINION BELOW

The opinion of the Court of Appeals is unreported at the time this petition is being prepared but appears in the record accompanying this petition and appears in Appendix A hereof. The findings of facts, conclusions of law and order of the District Court are not reported, but appear at Pages 40 to 46, of the record hereof.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1966, and appears in Appendix B hereof. Petition for rehearing was denied on June 15, 1966, by order shown in Appendix C hereof. Jurisdiction of this Court is invoked under 28 U. S. Code 1254 (1).

QUESTION PRESENTED

Where a railroad fails to furnish reasonable railroad transportation may the person entitled to such transportation enforce his right thereto in the Federal Courts?

STATUTES INVOLVED

Chapter 49, Sec. 1 (4), U. S. Code, imposes a burden on carriers to furnish transportation upon reasonable request therefor, (Appendix D). This is a codification of the common law right to service. The question here is whether the Interstate Commerce Act limits the right of a shipper to secure that service by common law action in the Federal Courts. Even if limited entirely to action under the Interstate Commerce Act the jurisdiction of the Court is specifically preserved by the Act. Chapter 49, U. S. Code Section 23, (Appendix E).

JURISDICTION OF DISTRICT COURT

The jurisdiction of the District Court was based on diversity of citizenship and because the case arose under the laws of the United States. Title 49, U.S.C.A. The amount involved exceeds $10,000.00. (R 43).

STATEMENT

The record demonstrates a critical situation. Petitioner here has owned a grain elevator located along the railroad of Respondent for 15 years (R 57). During that entire time, Respondent's railroad service has been worsening (R 57). This is caused by failure of Respondent over a long period of time to replace such a large number of its worn out cars that it now is unable to transport the crops of the territory within a reasonable time (R 74-75). Respondent regularly and constantly fails to comply with Petitioner's reasonable demands for transportation (R 58). Because of this poor, delayed and deteriorating railroad service, Petitioner

has been unable fully to employ his elevator for the purchase and sale of grain (R 56), and those products he has bought and stored are subjected to damage, deterioration and destruction because of the delay in transportation (R 55). Plaintiff has invested approximately $200,000.00 in his elevator, but as a result of his inability to secure adequate railroad service, it is doubtful whether the installation has any present value (R 57). This situation is not one peculiar to Petitioner but is a part of a nation wide car shortage threatening the health, efficiency and economy of the agricultural area of the Midwest.

In the proceedings below, the Court was aided by a brief filed by the Interstate Commerce Commission as amicus curiae. The Commission disclosed it has been investigating this situation since 1954, but nothing has been accomplished because it lacked authority from the Congress to act.

Since the decision of the Circuit Court in this case, Congress has authorized the Interstate Commerce Commission to provide for a payment to be made to the owner of a car in the possession of another carrier, of an amount sufficient to make it economical for the railroads to build their own cars rather than hold and use the cars of other carriers. (Public Law 89-430; 80 Stat. 168). This is looked upon by the Congress as an incentive to the railroads to build their own cars. The act gave to the Interstate Commerce Commission no authority to order such cars be acquired but only to encourage purchase by the size of the charge which it orders for use of another carrier's car.

The District Court held that the facts in this case vested the Federal Courts with jurisdiction to require the offending railroad to furnish adequate transportation to petitioner even if it were necessary to acquire additional facilities to do so. The Court of Appeals reversed this decision and held that the furnishing of adequate transportation was a matter for the Interstate Commerce Commission and not the Courts'.

REASONS FOR GRANTING THE WRIT

1. The holding of the Court of Appeals that the Federal Court has no authority or jurisdiction to require railroads to furnish adequate transportation is directly contrary and in conflict with the decision of this Court in *U. S. vs. Pennsylvania RR* 242 *U. S.*, 208. This Court there specifically held that the Courts, and not the Commission, have jurisdiction to compel carriers to acquire the additional facilities necessary for it to furnish adequate transportation. This Court set aside, in that case, an order of the Interstate Commerce Commission requiring the acquisition by the defendant railroad of certain tank cars, because the matter was not within the jurisdiction of the Commission but was in the jurisdiction of the Federal Courts. This is the precise question involved here, but the Court of Appeals did not even consider this opinion but stated the law to be directly contrary to the holding of this Court.

2. There is a conflict amongst the Circuits as to the applicable law.

The Eighth Circuit in *Chicago, Rock Island and Pacific Railroad Co., vs. Lawton Refining Co.*, 253, *Fed.* 705, followed the opinion of this Court in *U. S. vs. Pennsylvania Railroad Co., supra,* saying:

> "it was then held that if any duty to furnish such cars exists, it is enforceable in the courts, not by the commission. For a carrier's refusal to accept proper shipments, or to supply reasonable adequate facilities of carriage, the shipper has a remedy by action."

However, the Sixth Circuit, in *L. & N. Railroad vs. Cory*, 54, *Fed.*, 8, and the Seventh Circuit Court in the instant case (Appendix A) have held to the contrary.

The division between the Circuits is wide and should be reconciled in such as an important matter as this.

3. The matters herein involved are of tremendous importance to the agricultural sections of the Midwest. The refusal of Respondent to acquire the facilities necessary to transport the grain from the farm lands in its territory in a reasonably expeditious manner is adding a great burden on the entire economy and well being of the agricultural segment of the country. It is a source of constant trouble to farmers, grain dealers, and allied occupations and industries. The Interstate Commerce Commission has not in the past, and has not now, any direct authority to cure the situation. The most it can do under its recent congressional authority is to impose a rental charge so large that it should encourage railroads to build their own cars. Such authority has not yet been exercised by the commission, and while we assume it will use the authority to the best interest of all, at the most its action can only encourage the acquisition of necessary facilities of transportation to the farm communities but cannot firmly and finally require the adequacy of transportation which is the legal right of Petitioner and others like him. If the Courts do not intervene Petitioner and many like him, farmers and those businesses with whom they deal, will be greatly damaged, and some will be destroyed.

Respectfully submitted.

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965 — APRIL SESSION, 1966

No. 15489

J. W. SPENCE, doing business as GEFF SEED AND GRAIN CO., *Plaintiff-Appellee*,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, a corporation, *Defendant-Appellant*.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

MAY 18, 1966

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges*.

KNOCH, *Circuit Judge*. This appeal has been taken from temporary restraining order and temporary injunction order of the United States District Court directing the defendant, The Baltimore & Ohio Railroad Company, to provide the plaintiff, J. W. Spence, doing business as Geff Seed and Grain Co., with sufficient, but not less than eight, boxcars daily for hauling soybeans from plaintiff's elevator at Geff, Illinois.

In his complaint, the plaintiff alleged that the defendant was discriminating against the plaintiff in failing to provide plaintiff with sufficient cars for timely removal of the perishable grains in plaintiff's elevator to the plaintiff's irreparable loss through deterioration of over-long stored produce, inability to meet custom-

ary delivery dates, or to accept new grain offered for storage by plaintiff's customers.

The temporary restraining order was issued October 13, 1965, without notice or hearing. On October 18, 1965, the defendant moved to dissolve the temporary restraining order for want of jurisdiction in the U. S. District Court. A hearing was held at which evidence was adduced that plaintiff's elevator bins were filled to capacity, so that he had to refuse tenders of additional produce for storage; that the stored soybeans would lose value unless removed; that plaintiff's elevator has been receiving steadily poorer service from defendant over the past fifteen years primarily because of failure by defendant to replace worn out cars, about 1000 damaged or otherwise obsolete boxcars having accumulated unrepaired over the years at Flora, Illinois, with about 600 junked in this territory in the past few years; that the elevator in which plaintiff has invested about $200,000 is now of doubtful value; that the defendant does not have enough cars to meet the demands of the plaintiff and those of the other 53 elevators located on the lines of the defendant railroad between Cincinnati, Ohio, St. Louis, Missouri, Beardstown, Illinois, and Shawneetown, Illinois.

The District Judge found that:

> 5. Defendant's failure and refusal to furnish said cars for loading and transportation results from the failure and refusal of defendant to repair the cars belonging to it available and appropriate for the purpose of transportation of said soybeans; the cars belonging to defendant available and appropriate for such purpose have deteriorated to the point where they are no longer appropriate for the purpose of defendant; and defendant has failed and refused, and continues to fail and refuse to either: (a) repair said cars and make them appropriate for said purpose, or (b) to acquire other cars for that purpose.

* * * * *

8. Defendant's testimony in open court discloses that in the territory here involved (*i.e.*, the St. Louis Division of said defendant), approximately 1,000 boxcars appropriate for the purpose herein described, have deterioated to the extent that they are no longer usable for such purposes. It further shows that defendant has neither made any repairs to said cars to render them usable, nor has it acquired other appropriate cars in lieu thereof. Such testimony discloses no plan or program of the defendant either to repair said cars or to acquire others. As a consequence, the ability of defendant to discharge its obligation to furnish adequate transportation is critically impaired, and will continue further to decline.

The District Court concluded that:

3. It is the duty of defendant to provide safe and adequate transportation to plaintiff upon reasonable notice, and defendant is not excused from that obligation by failing and refusing to repair its cars appropriate thereto, or failing and refusing to acquire and furnish other cars in lieu thereof.

4. Plaintiff, as a matter of law, is entitled to the Preliminary Injunction prayed for under the facts alleged to in the verified Complaint, the verified Motion for Preliminary Injunction, and testimony heard in open court.

An Order for Preliminary Injunction issued November 1, 1965, directing defendant as follows:

That you forthwith furnish Plaintiff with sufficient boxcars, at his Elevator at Geff, Illinois, of a type to properly haul soy beans and protect same against rain and inclement weather, to remove all soy beans now located in Plaintiff's Elevator at Geff, Illinois, together with all soy beans purchased by him in due course of business and offered for shipment while the soy beans in the Elevator are being removed,

said boxcars to be furnished at the rate of not less than eight (8) daily; unless a lesser number is requested by Plaintiff, and to remove the filled cars the next time Defendant's train makes a trip past Plaintiff's Elevator and not later than the following day and to replace the filled cars on Plaintiff's railroad siding with empty cars. That you instanter cease failing and refusing to furnish Plaintiff a sufficient amount of boxcars of a type proper to haul soy beans and protect same against rain and inclement weather, to remove all soy beans now located in his Elevator at Geff, Illinois, together with all soy beans purchased by him in due course of business and offered for shipment while the soy beans in the Elevator are being removed, and to cease instanter to fail, refuse and neglect to furnish Plaintiff at his Elevator at Geff, Illinois, said boxcars at the rate of not less than eight (8) daily, unless a lesser number is requested by Plaintiff, and to remove the filled cars the next time Defendant's train makes a trip past

---

[1] **§ 28. Mandamus to obtain equal facilities for shippers**

The district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of this chapter and chapters 8, 12, and 13 of this title, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: **Provided,** That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: **Provided,** That the remedy given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this chapter and chapters 8, 12, and 13 of this title.

[2] § 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulatng commerce or protecting trade and commerce against restraints and monopolies.

Plaintiff's Elevator and not later than the following day and to replace the filled cars on Plaintiff's railroad siding with empty cars, until such time as Plaintiff's said Elevator shall be emptied.

There was no finding of discrimination. Plaintiff asserts in this Court that he is not relying on any discrimination to support his claim to mandatory injunction.

Plaintiff's theory is that he is entiled to railroad service under the provisions of the Interstate Commerce Act, and that jurisdiction to enforce plaintiff's right rests in the U. S. District Court under §23 of that Act (Title 49 U.S.C.)[1] and under Title 28 U.S.C. §1337[2]; that the Interstate Commerce Commission would have original jurisdiction only where the plaintiff sought to secure a preference over other shippers or to cure discrimination against him.

The Interstate Commerce Commission was not a party to the proceedings in the District Court. The Orders there were entered without prior reference of the matter to the Commission. In this Court, the Commission has filed a brief as Amicus Curiae.

Plaintiff contends that it was proper for him to secure relief in the U. S. District Court because he is not asking that Court to fix the method whereby the defendant shall acquire the facilities to provide the service ordered, that such means may well be a matter exclusively for the Interstate Commerce Commission and the defendant railroad, but that it was within the jurisdiction of the District Court to order the end result; that defendant is entitled to a reasonable period of time to secure such equipment as it may now lack to provide the directed service to plaintiff and that for such limited reasonable time, the defendant is purged of contempt of the District Court's Orders.

As the Interstate Commerce Commission does not now assert the authority to direct a railroad to acquire more boxcars, plain-

tiff feels that the United States District Court must be empowered to do just that.

We agree with the Commission that in this case the District Court engaged in an administrative investigation of the available cars in the territory, found that the defendant railroad had a number of obsolete cars on hand and enjoined the defendant railroad for failing to supply the cars requested by one particular shipper, the plaintiff.

Section 23 grants authority to the District Court under certain circumstances to enter orders in the nature of mandamus to compel a carrier to grant as many cars to one shipper as to another similarly situated shipper, but the District Court found no such discrimination here, and plaintiff concedes that such discrimination does not exist here.

Under similar circumstances, in *B. & O. RR. v. U. S. ex rel. Pitcairn Coal Co.*, 1910, 215 U. S. 481, 493, 30 S. Ct. 164, 169, the Supreme Court saw "no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced; at least, until that body, . . . had been afforded, by a complaint made to it, the opportunity to exert its administrative functions."

In this case we have an issue to be decided by the Commission: the reasonableness of the defendant's method of car distribution for seasonal loading during a car shortage. The case thus differs from the situations involved in such cases as *Penn. R. Co.* v. *Son-Man Co.*, 1916, 242 U. S. 120, 124, 37 S. Ct. 46, 48, for example, where the parties agreed that the shipper made a reasonable demand and there was an unexplained failure to supply cars in confessedly normal conditions, leaving no administrative question for the Interstate Commerce Commission to solve.

The Orders of the District Court compelling the defendant to furnish the plaintiff with a specified number of cars may create

that very discrimination which the Commission must strive to avoid with the aid of its Bureau of Railroad Safety & Service which acts as a clearing house to ascertain the needs of shippers and the availability of cars by the respective carriers. The car shortage on the B. & O. is a symptom of a national problem now the subject of a full-scale investigation by the Commission.

Currently Service Order 973, 31 F.R. 1303, provides:

> *It appearing,* That in the opinion of the Commission there exists a shortage of equipment, particularly of plain boxcars, in certain sections of the country of such a nature as to create an emergency requiring immediate action; that existing carrier rules, regulations, and practices with respect to the use, supply, control, movement, distribution, exchange, interchange, and return of cars to the railroads owning such cars are ineffective; that car service will be promoted in the interest of the public through the issuance of car distribution directions for the location or relocation of empty cars; that notice and public procedure are impractical and contrary to the public interest under the circumstances; and that good cause therefor exists for the entry of this order upon less than 30 days' notice:
>
> *It is ordered,* That:
>
> § 95.973 *APPOINTMENT OF AGENTS*
>
> (a) R.D. Pfahler, Director and H. R. Longhurst, Assistant director, Bureau of Railroad Safety and Service, Interstate Commerce Commission, Washington, D.C., and each of them are hereby appointed Agents of the Interstate Commerce Commission and vested with authority to issue Car Distribution Directions with respect to the location and relocation of empty cars, and to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers by railroads as in their opinion will

best promote the service in the interest of the public and the commerce of the people.

(b) *Rules, Regulations, and Practices Suspended.* The operation of all rules, regulations, and practices insofar as they conflict with the provisions of this order, is hereby suspended.

We conclude that the U.S. District Court lacked jurisdiction to enter the Orders from which appeal has been taken. The Decision of the District Court is accordingly reversed and this cause is remanded to dissolve the temporary restraining order and the temporary injunction heretofore entered herein.

REVERSED AND REMANDED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

USCA 3464—The Scheffer Press, Inc., Chicago, Illinois—5-18-66—150

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60610

WEDNESDAY, MAY 18, 1966

BEFORE

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

J. W. SPENCE, doing business as GEFF SEED AND GRAIN CO., *Plaintiff-Appellee,*

No. 15489 vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, a corporation, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decision of the said District Court in this case appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and it is hereby REMANDED to the said District Court, to dissolve the temporary restraining order and the temporary injunction heretofore entered herein, in accordance with the opinion of the Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

WEDNESDAY, JUNE 15, 1966

BEFORE

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

J. W. SPENCE, d/b/a GEFF SEED AND GRAIN CO.,
Plaintiff-Appellee,

No. 15489 vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause, filed by the appellee herein, be, and the same is hereby DENIED.

APPENDIX D

Title 49, Sec. 1 (4) U. S. C. A.

"It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor . . ."

APPENDIX E

Title 49, Section 23 of U. S. C. A.

"The District Courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of this chapter and chapters 8, 12 and 13 of this title, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ; Provided, that if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the Court, or otherwise, as the Court may think proper, pending the determination of the question of fact; Provided, That the remedy given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this chapter and chapters 8, 12 and 13 of this title."